No. 76-604

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED CONTRACTORS INCORPORATED, ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. A-53 to A-58) are not officially reported. The decision and order of the National Labor Relations Board (Pet. App. A-1 to A-53) are reported at 220 NLRB No. 88.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1976, and a timely petition for rehearing was denied on July 23, 1976. The petition for a writ of certiorari was filed on October 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that the employer violated Section 8(a)(5) and (1) of the National Labor Relations Act by dealing directly with its employees rather than with their bargaining agent, by unilaterally changing wages and employment conditions, and by failing to apply the terms of a validly executed collective bargaining agreement; and violated Section 8(a)(3) and (1) of the Act by discharging three employees because they engaged in concerted activity protected by the Act.

2. Whether the court of appeals properly held that the employer's lack of counsel in oral argument and in preparation of its reply brief did not prejudice presentation of its case before the court.

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, as amended, 61 Stat. 136, 140, 73 Stat. 519, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
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> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

The Administrative Law Judge, whose decision the Board adopted (Pet. App. A-51 to A-53), found that petitioners ("JMCO," "United," or "the Company"), are a single employer for purposes of the Act (Pet. App. A-25). He also found that the Company violated Section 8(a)(5) and (1) of the Act by, *inter alia*, dealing directly with its employees with respect to the terms of, and by repudiating, the contract with the Union,[1] executed on August 20, 1974 (Pet. App. A-27, A-39). Finally, he found that the Company violated Section 8(a)(1) of the Act by threatening Milan Mix and Guy Bourdo with reprisals for their union activity, and Section 8(a)(3) and (1) of the Act by discharging Mix, Bourdo, and Percy Williams for concerted activity protected by the Act (Pet. App. A-33, A-36). The facts on which these findings are based are set out in detail in the Administrative Law Judge's decision (Pet. App. A-5 to A-24) and are summarized below.[2]

United (which is engaged in construction) and JMCO (which is engaged in trucking) operate under the common control and management of Jim Mews, who owns 100 percent of JMCO's and 90 percent of United's corporate stock. Mews actively directs both companies' day-to-day affairs and makes all major business and policy decisions for them, including those involving labor relations and personnel matters. Mews directly supervises

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[1]Local 200 of the Teamsters.

[2]The Statement in the petition (Pet. 4-10) reflects the version of events narrated by Jim Mews, the owner of petitioners. The Administrative Law Judge found that the testimony of Mr. Mews was not credible. Pet. App. A-10 n. 5, A-13 n. 9, A-16 n. 11, A-18 n. 13, A-21 n. 16, A-22 nn. 17-18, A-29 n. 23, A-30, A-32, A-36 n. 30, A-38. The Board upheld this credibility finding. Pet. App. A-52 n. 1.

employees of both JMCO and United, and LaVerne Schlei, a supervisory employee of United, also directs and supervises JMCO employees. The two companies have the same corporate officers (Mews and his wife), operate from the same location, and share the same office clerical staff (Pet. App. A-5 to A-6). In 1970 United sold its trucks and transferred its drivers to JMCO,[3] which then began its trucking service. Most of JMCO's revenues have come from payments by United, and employees frequently transfer between the two companies (*ibid.*).

In the fall of 1973, months before JMCO's contract with the Union was to expire,[4] Mews, without notifying the Union, began to discuss with the drivers a plan to pay them a percentage of JMCO's charges to the users of its truck service, in lieu of the contractual wages and benefits (Pet. App. A-9 to A-10; Tr. 83-84, 119-120). Although the drivers expressed displeasure at the proposed change, after the collective agreement expired Mews unilaterally abrogated the employees' hourly wages without notice to the Union, instituted the percentage wage system, ceased paying vacation and holiday benefits, and discontinued payments to the Teamsters' health and welfare and pension funds (Pet. App. A-13; Tr. 84).

In August 1974 Mews signed a new contract with the Union covering the Company's drivers. The contract, effective through May 31, 1977, was executed on behalf

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[3]When Mews transferred the drivers from United to JMCO in 1970, there was no change in their duties, supervision, or rate of pay; the same was true when Mews transferred the drivers from JMCO to United in September 1974 (Pet. App. A-7; Tr. 22, 76-79, 106, 118-119, 167).

[4]In 1971 the Union and JMCO entered into a collective bargaining agreement, which was effective through May 31, 1974.

of United rather than JMCO (Pet. App. A-15 to A-17). Even after executing the contract, however, the Company continued to disregard the contractually prescribed wage rates and fringe benefits (Pet. App. A-18 to A-19).

After the Company unilaterally changed its system of remuneration in 1974, drivers Bourdo and Mix filed a grievance with the Union (Pet. App. A-14 to A-15). Bourdo and Mix filed a second grievance on September 17, 1974, after the Company executed a contract with the Union but refused to abide by its terms (Pet. App. A-19). The Union mailed Mews a letter concerning this grievance, and on September 27 Union representative Duane Kraemer went to Mews's office to discuss the grievance (Pet. App. A-19).

Three days later Mix was summoned to Mews's office. Mews, holding copies of the two grievances and the Union's letter, angrily demanded to know "what [Mix] was trying to pull" and why he had filed the grievance. After Mix explained his reasons, Mews fired Mix, telling him to "turn in his truck keys" until Mix "straightened out" the matter with the Union (Pet. App. A-20 to A-21; Tr. 137). Bourdo was discharged when he reported for work on October 4 (Pet. App. A-21 to A-22). Williams was discharged the same day, ostensibly for lack of work (Pet. App. A-22).

On October 8, 1974, JMCO reinstituted its former trucking operations with newly hired non-union drivers (Pet. App. A-23). Mews later responded to the Union's grievance letters by stating that JMCO had terminated its contract with the Union (Pet. App. A-30).

The Administrative Law Judge found that JMCO and United are a single employer for the purposes of the Act, and that the Company therefore could not evade its bargaining obligation to the Union by signing the contract on

behalf of United and then performing its trucking operations through JMCO without applying the contract (Pet. App. A-37 to A-38). He also rejected, as not supported by the credited evidence, the Company's contentions that it did not violate its bargaining obligation because (1) on several occasions it expressed its willingness to meet with the Union and negotiate a contract for JMCO; and (2) the Union refused to bargain by insisting that the Company sign the association contract or face a strike (Pet. App. A-38 to A-39). Finally, he rejected the Company's assertions that Mix and Bourdo were not "discharged" but that their positions had ended when United ceased trucking operations, and that they were offered, but refused, employment with JMCO (Pet. App. A-30, A-32 to A-33), and that Williams was discharged because he was an unsatisfactory employee and because of lack of work (Pet. App. A-34 to A-36).

The court of appeals enforced the Board's order. The Company petitioned for rehearing, maintaining that it had been deprived of adequate judicial review because Mews, who is not an attorney, had been permitted to argue the case orally and to file a reply brief.[5] The court denied the petition, observing (Pet. App. A-57):

> The original brief was filed by competent counsel who adequately advanced the arguments in support of the petition for review of the National Labor Relations Board order. Many cases come before this court and are decided without a reply brief being filed and reply briefs when filed are often merely a reiteration and reemphasis of what has already been said in the original brief. This Court may if it so desires dispense with oral argument although it ordinarily favors it.

[5]Following issuance of the Board's order, the Company, by counsel who had represented it throughout the proceedings before the Board, filed a petition for review in the court of appeals. The Board filed a cross-application for enforcement. The Company's counsel then prepared and filed a brief in support of the petition, and the Board filed its answering brief. Mews's dissatisfaction with his attorney led him to file his own reply brief. The Company's attorney then withdrew from the case, and Mews was permitted to argue his own case.

The court added that Mews had had ample time to secure new counsel prior to oral argument after counsel who filed the opening brief withdrew (*id.* at A-57 to A-58.

ARGUMENT

1. The basic issue presented by the petition is whether substantial evidence supports the Board's findings that United and JMCO were a single employer for purposes of the Act and that the Company violated its bargaining obligations under the Act and unlawfully discharged three employees. These purely evidentiary issues do not warrant review by this Court. *South Prairie Construction Co.* v. *Local 627, Operating Engineers,* No. 75-1097, decided May 24, 1976; *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. In any event, the facts we have recounted amply support the Board's decision.

2. The question whether corporate officers who are not lawyers may represent their corporations in the court of appeals is not presented here. The court below did not decide that question but held simply that, on the particular facts here, "the petitioning corporations were [not] deprived of an adequate appeal, or in effect, a fair disposition of their case, by virtue of the fact that they were not represented by counsel in oral argument or in the preparation of their reply brief" (Pet. App. A-56 to A-57). The petition does not challenge the court's determination that the Company was not prejudiced; in any event, it raises no issue warranting review by this

Court. The Sixth Amendment's guarantee of effective assistance of counsel does not apply in civil suits. If, as petitioners maintain, Mews acted improperly or not in the best interests of the corporations, that is a matter to be settled between petitioners and Mews; it is not a reason to hold another hearing in the court of appeals.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]The cases cited by petitioners (Pet. 13-14) as standing for the proposition that a corporate officer who is not an attorney has no *right* to appear in court on behalf of the corporation do not support the proposition that a court of appeals, which has plenary authority over the practice of law before it, cannot allow such an appearance. Moreover, because this is not a criminal case, it is not similar to *Stockheimer* v. *United States*, No. 76-5152, certiorari denied, November 15, 1976, to which petitioners refer (Pet. 12). Cf. *United States* v. *Suchy*, 540 F. 2d 254 (C.A. 6).